

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	8:00CR59
)	
Plaintiff,)	
)	ORDER
vs.)	
)	
HOMAR ESCARSEGA,)	
)	
Defendant.)	

This matter is before the court on defendant's Motion to Request Trial Transcripts and Legal Documents, Filing No. 45, and Motion for Leave to Proceed In Forma Pauperis, Filing No. 46. The court notes that the time for a direct appeal has expired, as this court sentenced defendant on November 30, 2000, Filing No. 37. Judgment was entered on December 13, 2000, Filing No. 39. The court notes that defendant has failed to file a request for habeas corpus pursuant to 28 U.S.C. § 2255.

28 U.S.C. § 2250 contemplates the filing of a motion for collateral review of a conviction and a motion for leave to proceed in forma pauperis **before** free copies of the record or parts of the record may be furnished to the moving party. Section 2250 states:

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

See also Chapman v. U.S., 55 F.3d 390, 390-91 (8th Cir. 1995):

We held in *United States v. Losing*, 601 F.2d 351, 352 (8th Cir. 1979) (*per curiam*), that under 28 U.S.C. § 753(f) and under Supreme Court authority "any request for a free transcript prior to the filing of a section 2255 complaint is premature." We also held that under section 753(b), access to materials such as a transcript is not constitutionally required until after judicial certification that access is required to decide issues presented in a pending,

non-frivolous case. *Id.* at 353. The district court correctly held that [the defendant] was not entitled to copies of transcripts at government expense in advance of filing suit.

Once a § 2255 motion is filed, 28 U.S.C. § 753(f) provides funds for a transcript if the defendant qualifies. “Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal.” *Id.*

Therefore, before the court will consider any request for copies, defendant must file a motion seeking collateral relief.

IT IS ORDERED:

1. The defendant’s Motion to Request Trial Transcripts and Legal Documents, Filing No. 45, and Motion for Leave to Proceed In Forma Pauperis, Filing No. 46. are denied.
2. The Clerk’s Office is ordered to mail to the defendant at his last known address the forms and instructions for initiating a proceeding pursuant to 28 U.S.C. § 2255 and for requesting leave to proceed in forma pauperis.

DATED this 18th day of January, 2011.

BY THE COURT:

s/ Joseph F. Bataillon
Chief United States District Judge